JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

A

Public Prosecutor v Low Kian Boon & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–72 OF 2006, B-05–73 OF 2006 AND B-05–74 OF 2006
GOPAL SRI RAM, HASAN LAH JJCA AND JEFFREY TAN J
8 APRIL 2009

C

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — High Court judge held that respondents no intention to kill deceased and found them guilty of lesser offence of culpable homicide not amounting to murder — Whether High Court judge had misdirected himself on facts and evidence and upon law in holding that lesser offence had been committed — Common intention — Whether High Court judge had properly addressed issue of common intention

D

Low Kian Boon and Tan Pei Yan ('the respondents'), were charged with committing the murder of Hans Herzog ('the deceased'), an offence under s 302 of the Penal Code ('Code'). According to Ulan Joe Yok ('the deceased's wife'), on the night of 11 November 2003 while the deceased was investigating the presence of intruders in his second stepdaughter's room he was attacked by one of two assailants carrying a *parang*. Later the deceased's wife found the deceased lying dead on the ground floor with 23 slash wounds to his body. A *parang* that was recovered from the second stepdaughter's room, which had blood stains that matched those of the deceased, was identified as the murder weapon. The prosecution adduced evidence that the first respondent was in the vicinity of the deceased's house at about the time the crime was committed; that at a little past midnight on 12 November 2003, the respondents were both picked up from a Shell station, which was close to the deceased's house, by a group of friends in their car; that when the respondents were picked up from the petrol station they were wearing blood stained clothes and the second respondent was in a state of shock. When the friends in the car enquired as to what had happened the second respondent had responded that he and the first respondent had killed someone but that they had no intention to cause death. There was also evidence identifying the appellants to be the two persons purchasing the *parang*, which was the murder weapon. The defence of the respondents was a denial. The respondents testified that the purchase of the *parang* and the murder of the deceased had been orchestrated by one 'Ivan'. The trial judge had held that the respondents had no intention to kill the deceased and as such they could not be guilty of murder under s 302 of the Code. Instead he found them guilty only of the lesser offence of culpable homicide not amounting to murder under the second limb of s 304 of the Code and sentenced them to imprisonment for a period of ten years to take effect from their date of arrests. This was the prosecution's appeal against conviction and

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JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

sentence as the charge originally made against both appellants was framed pursuant to s 302 of the Code. The prosecution submitted that the trial judge's finding that the fatal injury was inflicted unintentionally upon the deceased during the 'fight downstairs' was pure speculation. The prosecution argued that this finding by the trial judge attributed a defence to the respondents, which had not been advanced by either of them or warranted by the evidence that had been placed before the court. The issues to be dealt with in this appeal were whether the High Court judge had misdirected himself on the facts and evidence and upon the law in holding that the lesser offence had been committed; and whether the High Court judge had properly addressed the issue of common intention. The respondents have also appealed to set aside their conviction under s 304 on the grounds that they are not guilty of any offence.

Held, allowing the appeal by the prosecution, substituting the convictions under s 304 with conviction under s 302 of the Penal Code; dismissing the appeals of the respondents:

(1) Based on proved facts the trial judge was entirely correct in finding that the respondents' defence of innocent presence failed. However the trial judge had erred in his finding that the respondents had no intention to kill the deceased and as such could not be guilty of murder under s 302 of the Code. This is because from the evidence adduced it was clear that there was not an iota of evidence that the deceased had pursued his attackers in the manner described by the trial judge but there was evidence to show that one of the attackers had pursued the deceased downstairs. The prosecution had led cogent evidence to show that the respondents' suggestion that there was no intention to kill was untrue. After taking into account the element of premeditation, the nature of the weapon used, the nature of the injuries inflicted on the deceased, which included a savage attack, and all other surrounding circumstances the irresistible conclusion to arrive at was that both respondents intended to kill the deceased. The High Court judge had misdirected himself on the facts and evidence and upon the law in holding that the lesser offence under s 304 of the Code had been committed. This court thus reversed the decision of the High Court and reinstated a conviction pursuant to s 302 of the Code, which was the original charge (paras 5–8, 10 & 14).

(2) The facts and circumstances of the case taken together with the flight of both respondents from the scene of the crime supported the existence of a common intention (para 12).

(3) Although both respondents were guilty of murder, only the first respondent was sentenced to death. Since the second respondent was a child within the Child Act 2001 ('the Act') at the date of the commission of the offence, no sentence of death should be passed against him. Instead

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

this court made an order under s 97 of the Act for the detention of the second respondent at a place of lawful imprisonment at the pleasure of His Royal Highness the Sultan of Selangor (para 15).

[Bahasa Malaysia summary

Low Kian Boon dan Tan Pei Yan (responden-responden), dituduh melakukan pembunuhan Hans Herzog ('si mati'), suatu kesalahan di bawah s 302 Kanun Keseksaan ('Kanun'). Menurut Ulan Joe Yok ('isteri si mati'), pada malam 11 November 2003 sementara si mati menyiasat kehadiran pencerobohan di dalam bilik anak tiri perempuan kedua, dia diserang oleh salah seorang daripada dua orang penyerang yang membawa parang. Kemudian, isteri si mati menjumpai si mati terbaring di tingkat bawah dengan 23 luka ke atas anggotanya. Sebilah parang dirampas di bilik anak tiri perempuan kedua, yang mempunyai kesan darah yang sepadan dengan si mati, dikenalpasti sebagai senjata pembunuhan. Pihak pendakwaan mengemukakan bukti bahawa responden pertama berada di dalam kawasan rumah si mati pada kira-kira masa jenayah dilakukan; bahawa selepas tengah malam pada 12 November 2003, kedua-dua responden diambil di stesyen Shell, yang paling berdekatan dengan rumah si mati, oleh sekumpulan rakan-rakan dalam kereta mereka; bahawa ketika responden-responden diambil di stesyen minyak, mereka memakai baju yang mempunyai kesan darah dan responden kedua dalam keadaan terperanjat. Apabila rakan-rakan di dalam kereta bertanyakan apa yang telah terjadi, responden kedua memberitahu bahawa dia dan responden pertama telah membunuh seseorang tetapi mereka tidak berniat untuk menyebabkan kematian. Terdapat juga keterangan yang mengenalpasti kedua-dua responden adalah dua orang yang membeli parang, yang merupakan senjata pembunuhan. Pembelaan responden-responden adalah penafian. Responden-responden memberi keterangan bahawa pembelian parang dan pembunuhan si mati telah dilakukan oleh 'Ivan'. Hakim bicara memutuskan bahawa responden-responden tiada niat untuk membunuh si mati dan dengan itu, mereka tidak boleh didapati bersalah di bawah s 302 Kanun. Sebaliknya, beliau memutuskan mereka bersalah bagi homisid salah yang tidak menjumlahkan kepada pembunuhan di bawah bahagian kedua s 304 Kanun dan menjatuhkan hukuman penjara ke atas mereka bagi tempoh 10 tahun bermula dari tarikh penangkapan. Ini adalah rayuan pendakwaan terhadap sabitan dan hukuman kerana tuduhan yang pada asalnya dibuat terhadap perayu-perayu di bawah s 302 Kanun. Pihak pendakwaan menghujahkan bahawa keputusan hakim bicara bahawa kecederaan parah telah disebabkan ke atas si mati dengan sengaja ketika 'pergaduhan di tingkat bawah' adalah spekulasi semata-mata. Pihak pendakwaan menghujahkan bahawa keputusan ini oleh hakim bicara mengaitkan pembelaan kepada responden-responden, yang tidak dikemukakan oleh salah seorang daripada mereka atau terjamin oleh bukti yang dikemukakan di mahkamah. Isu-isu yang harus dipertimbangkan dalam rayuan ini adalah sama ada Hakim Mahkamah Tinggi telah tersalah arah mengenai fakta-fakta dan bukti dan ke

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

atas undang-undang dalam memutuskan bahawa kesalahan yang kurang telah dilakukan; dan sama ada Hakim Mahkamah Tinggi telah mempertimbangkan isu niat bersama. Responden-responden juga telah merayu untuk mengenepikan sabitan mereka di bawah s 304 atas alasan mereka tidak bersalah bagi mana-mana kesalahan.

Diputuskan, membenarkan rayuan oleh pendakwaan, dan menggantikannya dengan sabitan di bawah s 304 dengan sabitan di bawah s 302 Kanun Keseksaan; menolak rayuan-rayuan responden-responden:

(1) Berdasarkan fakta yang dibuktikan, hakim bicara betul dalam memutuskan bahawa pembelaan responden-responden bagi kehadiran tidak bersalah, gagal. Walau bagaimanapun, hakim bicara terkhilaf dalam keputusannya bahawa responden-responden tiada niat untuk membunuh si mati dan dengan itu tidak bersalah di bawah s 302 Kanun. Ini kerana daripada bukti yang dikemukakan, tiada satu pun bukti bahawa si mati telah menyerang penyerangnya dengan cara yang digambarkan oleh hakim bicara tetapi terdapat bukti yang menunjukkan bahawa salah satu penyerangnya telah menyerangnya di tingkat bawah. Pihak pendakwaan telah mengemukakan keterangan yang jelas untuk menunjukkan bahawa cadangan responden-responden bahawa tiada niat untuk membunuh adalah tidak benar. Selepas mengambilkira elemen perancangan terlebih dahulu, keadaan senjata yang digunakan, keadaan kecederaan ke si mati, yang termasuk serangan ganas dan kesemua hal keadaan persekitaran kesimpulannya adalah bahawa kedua-dua responden berniat untuk membunuh si mati. Hakim Mahkamah Tinggi telah tersalah arah dalam fakta-fakta dan bukti dan ke atas undang-undang dalam memutuskan kesalahan yang kurang telah dilakukan di bawah s 304 Kanun. Mahkamah ini dengan itu, mengakas keputusan Mahkamah Tinggi dan menghidupkan semula sabitan di bawah s 302 Kanun, yang merupakan tuduhan asal (lihat perenggan 5–8, 10 & 14)

(2) Fakta-fakta dan hal keadaan kes ditambah dengan kedua-dua responden yang melarikan diri daripada tempat kejadian menyokong kewujudan niat bersama (lihat perenggan 12).

(3) Walaupun kedua-dua responden bersalah bagi kesalahan membunuh, hanya responden pertama yang dihukum mati. Memandangkan responden kedua adalah kanak-kanak di bawah Akta Kanak-Kanak 2001 ('Akta') ketika tarikh pelakuan kesalahan, tiada hukuman mati dijatuhkan ke atasnya. Sebaliknya, mahkamah ini membuat perintah di bawah s 97 Akta bagi tahanan responden kedua di tempat penahanan sah seperti yang diperkenankan oleh Duli yang Maha Mulia Sultan Selangor (lihat perenggan 15).]

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

Notes

For a case on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 2904.

Cases referred to

Anjaiah and others v State of Andhra Pradesh 2008 (1) ALD (Cri) 844 (refd)
Jagrup Singh v The State of Haryana AIR 1981 SC 1552 (folld)
Jai Prakash v State (Delhi Administration) 1991 AIR SCW 654 (folld)
Tan Hung Thiam & Anor v PP [1991] 2 MLJ 137, CA (refd)
Virsa Singh v State AIR 1958 SC 465 (refd)

Legislation referred to

Child Act 2001 s 97, 97(2)
Evidence Act 1950 s 21
Penal Code ss 34, 300, 302, 304

Appeal from: Criminal Trial No 45–3 of 2004 (High Court, Shah Alam)

Ahmad Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Edmund Bon (David Kok & Partners) for the first respondent.
Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the second respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] Hans Herzog died in tragic circumstances. He was done unto death. At the time, he was married to Ulan Joe Yok ('PW20'). She had been previously married. She had two daughters by that marriage, SK and SY. This is how Herzog came to meet its end.

[3] On 11 November 2003 at about midnight, after they had retired for the night, PW20 heard a knock on the bedroom door. She opened the door but found no one there. PW20 then went to SY's room. As she opened the door someone came at her. In fear she returned to her bedroom and told her husband about it. Herzog, whom we will hereafter refer to as the deceased, then went to SY's room himself. A little later, PW20 heard the deceased cry out in pain. The deceased then returned to his bedroom. PW20 noticed that his face had been slashed. Covering his wound with a T-shirt and ignoring PW20 pleas, the deceased went downstairs in search of his assailant. At about that time PW20 saw another figure, a male, proceed after the deceased. Later, the body of the deceased was found at the bottom of the staircase leading to the ground floor of

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

the house. He was quite dead. There were 23 slash wounds on his body including one at the base of his neck. That the deceased succumbed to these injuries is beyond doubt. A *parang* ('exh P22') was recovered from SY's room. It is said to be the murder weapon. Following police investigations, four persons were arrested and produced before the court. They were all charged under s 302 of the Penal Code read with s 34 of that Code for murdering the deceased. Of the four, SK and SY were the second and third child respectively. Both were acquitted at the close of prosecution's case. There is no appeal against that order and we therefore find it unnecessary to say anything further about this part of the case. The first accused and the fourth child were directed to enter upon their defence. Both gave evidence on oath. At the conclusion of the whole case, the learned trial judge found both guilty of an offence under s 304 of the Penal Code and sentenced each of them to ten years imprisonment from the date of their arrest. The public prosecutor being dissatisfied with the conviction on the lesser charge has now appealed to us. The first accused and fourth child have also appealed to us to set aside the conviction under s 304 on the ground that they are guilty of no offence whatsoever. We heard arguments on all three appeals yesterday and adjourned them to this morning to pronounce our decision and give our reasons for it.

[4] The evidence upon which the public prosecutor relies in support of his appeal is as follows. First, the nature of the injuries suffered by the deceased. These are such as to point to an intention to kill on the part of those who inflicted them. Second, the other evidence which the public prosecutor says irresistibly points to the first accused and the fourth child as being the assailants who inflicted the wounds on the deceased. In the first place, there is evidence that the first accused and the fourth child purchased two *parangs* from PW5 and PW6. One of the *parangs* is exh P22. In the second place, there is the evidence of PW17 and PW18. In a gist, this is what the two witnesses said. At a little past midnight, PW18 received a telephone call on his mobile from the fourth child asking to be picked up from a Shell petrol station at USJ. PW17 and PW18 went along. On arrival, the first accused and the fourth child emerged from the petrol station and entered the car. PW19 was driving it. Both PW17 and PW18 noticed that the clothing of the first accused and the fourth child was blood stained. Also, the fourth child appeared to be in a state of shock. While in the car, the fourth child informed PW17 and PW18 that he and the first accused had hit someone's father. All those in the car then proceeded to PW17's home where the fourth child had a shower and changed his clothes. PW17 then asked him what had happened. In response, the fourth child said that he and the first accused had killed someone but with no intention to cause death. These statements, submits the learned deputy who argued the appeal before us are admissible as admissions under s 21 of the Evidence Act 1950. In the third place, there is the blood stained clothing later recovered by the police during investigation which carried the blood of the deceased as established by DNA testing. A similar test was conducted on the

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

blood stain found on exh P22 which established that that weapon carried the deceased's blood. In the fourth place, there is evidence showing that the police party who arrived at the scene of the crime had used a tracker dog which had led them from the deceased's house to the very Shell station where PW17 and PW18 had picked up the first accused and the fourth child. Lastly, there is evidence to show that the first accused was seen in the compound of the deceased's house at about the time the crime was committed.

[5] The case for the first accused is that he never committed the crime. He was at the deceased's house to help SK and SY escape from the clutches of their stepfather. Both the first accused and the fourth child put the blame for the crime on someone called Ivan. The learned judge after a thorough discussion of the facts and evidence made the following finding:

> Based on the testimony of SP20, it is clear that there were only two persons inside the room of SY. In view of my finding that the first accused and fourth child (described in this judgment as the fourth accused) were inside the house of the deceased, and in the absence of evidence of any other intruders, I find that it was the first accused and fourth child who were inside SY's room. Based on SP20's evidence, it is clear that one of them had attempted to attack her when she opened the door of SY's room. It is also my finding, that upon deceased going to investigate who the intruders were, he was attacked inside the room (of SY) by one of them with a parang.

We accept that finding as entirely correct based on the proved facts before the learned judge. It follows that the defence of innocent presence failed.

[6] However, the learned judge then went on to say something about which the public prosecutor now made complaint. And this is what the learned judge said:

> However, I am unable to determine, on the evidence, whether it was the first accused or the fourth child who attacked him. Nevertheless, it is obvious that at that stage there was no intention at all to kill the deceased, otherwise they would have pursuit him to his bedroom, after the attack on him in SY's room. Again, based on SP20's testimony it is safe to infer, that because the deceased had not return to SY's room, but, instead, had run downstairs, he must have been aware that the first accused and fourth child were attempting to flee from the house, after the initial attack on him in SY's room, without intending to cause him any further injury. Nevertheless, it would appear that the deceased was determined, either to apprehend them or put up a fight with them, in the belief, in all probability, that his superior physical build (117kg) in contrast to the puny size of the first accused and fourth child would enable him to overpower them. Unfortunately, this must have triggered a further attack on the deceased downstairs, either by the first accused or fourth child, when he attempted to overpower them on their way out of the house. In all probability, the fatal injury must have been inflicted, unintentionally in this 'fight' downstairs.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

[7] It is the submission of the learned deputy who appeared before us that the finding encapsulated in the above quoted paragraph is pure speculation on the part of the learned judge. It was submitted that this is a case in which the learned judge was attributing a defence to the accused which had not been advanced by either of them or warranted by the evidence that had been placed before the court. After very careful and anxious consideration, we have arrived at the conclusion that there is merit in this argument. First, there is not an iota of evidence to suggest that the deceased had pursued his attackers in the manner described by the learned judge. On the other hand, there is evidence to show that one of the attackers had gone after the deceased. That is indeed what PW20 said. Second, there are the injuries suffered by the deceased. Third, there is the weapon exh P22 that was used to inflict the injuries in question.

[8] In answer to these points, learned counsel for both the first accused as well as the fourth child have argued that there is material within the prosecution's case which negates an intention to kill. They relied principally on the statement made by the fourth child to PW17. In that statement the fourth child had said that there was no intention to kill. It is submitted that since this forms part of the prosecution's case, the defence is entitled to rely on it to show that one of the vital ingredients of the offence of murder had not been made out. With respect, we do not agree. What PW17 was narrating was the fourth child's version given to him. The prosecution however led cogent evidence to show that the suggestion that there was no intention to kill was untrue. Next, it was submitted for the first accused and the fourth child that the learned trial judge was entitled to make a finding that both accused were attempting to flee the deceased's house by means of the staircase. However, as pointed out by learned deputy who has argued this appeal, if the accused really wished to make an escape they could have done so through SY's room. For, there is evidence to show that SY herself had left the house by exiting through her room.

[9] Now it is settled law that whether there is intention to kill in a given case is a question that should be approached along broad based, simple and common sense lines. See *Virsa Singh v State* AIR 1958 SC 465. In *Jai Prakash v State (Delhi Administration)* 1991 AIR SCW 654, the Supreme Court of India made the following observation with which we find ourselves in agreement:

> As noted already, when a person commits an act, he is presumed to expect the natural consequences. But the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the court has ascertained whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in *Virsa*

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

Singh's case, AIR 1958 SC 465, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number injuries inflicted and their nature and the part of their body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in and case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused. In some cases, an explanation may be there by the accused like exercise of right of private defence or the circumstances also may indicate the same. Likewise there may be circumstances in some cases which attract the first exception. In such cases different considerations arise and the court has to decide whether the accused is entitled to the benefit of the exception, though the prosecution established that one or the other clauses of s 300 IPC is attracted. In the present enquiry we need not advert to that aspect since we are concerned only with scope of cl thirdly of s 300, IPC.

[10] In *Jagrup Singh v The State of Haryana* AIR 1981 SC 1552, Sen J when delivering judgment said this:

these observations of Vivian Bose J have become locus classicus. The test laid down in *Virsa Singh*'s case for the applicability of clause thirdly is now ingrained in our legal system and has become part of rule of law. Under clause thirdly of s 300 of the Code, culpable homicide is murder if both the following conditions are satisfied: (a) that the act which causes death is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature, was sufficient to cause death, viz, that the injury found to be present was the injury that was intended to be inflicted.

[11] Applying the foregoing principles to the facts of this case, the following conclusions may be safely arrived at. Firstly, it was the first accused and the fourth child or either or both of them who must have inflicted the fatal injuries on the deceased. Secondly, applying the third limb of s 300 of the Penal Code they must be taken to have intended to cause the injuries found on the deceased. Thirdly, they must have intended thereby to cause the death of the deceased. Fourthly, the attack on the deceased was pre-planned. This is supported by the purchase of the two *parangs* including exh P22 and the stealthy manner in which the first accused and the fourth child entered the deceased's house. It is equally supported by the fact that one of them — either the first accused or the fourth child — pursued the deceased down the staircase of the deceased's home. Thus, taking into account the element of premeditation, the nature of the weapon used, the nature of the injuries inflicted on the deceased which indicate a savage attack and all the other surrounding circumstances to which reference has already been made, the

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

irresistible conclusion that a reasonable tribunal properly directing itself upon the law and the totality of the evidence would arrive at is that both accused intended to kill the deceased.

[12] That brings us to the application of s 34 of the Penal Code upon which argument was addressed to us. There is surfeit of authority on the way of which s 34 is to be applied and we find it sufficient to refer to two authorities on that subject. In *Tan Hung Thiam & Anor v Public Prosecutor* [1991] 2 MLJ 137, (CA), Chua J when delivering the judgment of the Court of Criminal Appeal of Singapore said:

> On the question of common intention under s 34 of the Penal Code, the trial judges relied on a long line of cases. It is clear from the decision of the Privy Council in *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1 and *Mahboob Shah v Emperor* AIR 1945 PC 118 and from the decision of the Court of Criminal Appeal of Singapore in *Mimi Wong & Anor v Public Prosecutor* [1972] 2 MLJ 75 that, in a criminal prosecution where s 34 is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

[13] On the facts and circumstances of the present case, we are satisfied as indeed the learned trial judge was that the first and fourth accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably support the existence of a common intention. We are conscious that there are authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases you will find that in each of them flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime.

[14] The other case we would refer to is a more recent one. It is *Anjaiah and others v State of Andhra Pradesh* 2008 (1) ALD (Cri) 844 where the court held as follows:

> Section 34 IPC lays down a principle of joint liability in doing a criminal act. The essence of liability is to be found in the existence of common intention animating

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Fri Sep 30 14:38:10 2011
//caseml/case/mlj/08-Low_Kian_Boon1_185495_126936_01

the accused leading to the doing of a criminal act in furtherance of such intention. The distinct of s 34 is element of participation in action. The common intention implies acting in concert, existence of prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arranged or premeditated concert. Common intention is to be inferred from the circumstances particularly the part played by the accused and surrounding circumstances namely nature of the weapon used and injury inflicted as well as the meeting of the minds among the accused who are being held constructively liable. There is no uniform inflexible rule for applying the principle of common intention. The inference there for must be drawn from the totality of the facts and circumstances of each case vide the decision of the Supreme Court in *Rotash v State of Rajasthan* 2007 (1) ALD (Crl) 217 (SC); 2007 AIR SCW 44. Each case, however, has to be decided on its own merit. Facts of each case may have to be dealt with differently. Totality of circumstances could hardly be ever simsilar in all cases.

[15] Drawing the threads together, we would sum up in this way. The prosecution had at the close of the whole case before the High Court established all the ingredients of an offence under s 302. The learned judge therefore misdirected himself on the facts and evidence and upon the law in holding that the lesser offence under s 304 had been committed. For the reasons already given, we would therefore allow the appeal of the public prosecutor and set aside the conviction of the first accused and the fourth child under s 304 of the Penal Code and substitute in it is place a conviction under s 302.

[16] In relation to sentence, we must deal with the fourth child first. He was a child within the Child Act 2001 at the date of the commission of the offence. In accordance of s 97 of the said Act, no sentence of death shall be passed against him. We would therefore, in his respect make an order under s 97(2) of the same Act and direct that he be detained at a place of lawful imprisonment at the pleasure of His Royal Highness the Sultan of Selangor. The first accused is found guilty of murder and sentence of death is hereby passed upon him.

[17] The appeals of the first accused and the fourth child are hereby dismissed.

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Appeal by prosecution allowed, convictions under s 304 subsituited with conviction under s 302 of the Penal Code; appeals of respondents dismissed.

Reported by Kohila Nesan